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SUPREME COURT OF THE STATE OF FLORIDA

OCTOBER TERM, 1948

GULFSTREAM PARK RACING ASSOCIATION, INC., A FLORIDA CORPORATION, AND GABLES RACING ASSOCIATION, INC., A FLORIDA CORPORATION,

Appellants,

vs.

HIALEAH RACE COURSE, INC., A FLORIDA CORPORATION, AND THE FLORIDA STATE RACING COMMISSION, A STATUTORY BODY CREATED UNDER THE LAWS OF THE STATE OF FLORIDA,

Appellees

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR MANDATE OF THE SUPREME COURT OF FLORIDA ENTERED ON THE 21ST DAY OF DECEMBER, A.D., 1948.

Gulfstream Park Racing Association, Inc., a Florida corporation, the Plaintiff in a certain cause originally filed in the Circuit Court of Dade County, Florida, together with Gables Racing Association, Inc., a Florida corporation, both of which said corporations were Respondents on an interlocutory appeal by certiorari to the Supreme Court of Florida, having this day presented their Petition for Appeal to the Supreme Court of the United States, and having

filed their Assignments of Errors relied upon, now file this their Statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order and mandate of this Court in question, and to exercise such jurisdiction in this case.

a. The Statutory Provisions Believed to Sustain the Jurisdiction

Section 1257, United States Code Annotated, a revision of former Section 344 of Title 28, which is an amendment to Judicial Code, Section 237, provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

This appeal directly brings into question the validity of the final mandate and judgment of the Supreme Court of Florida dated the 21st day of December, A. D., 1948, in which the Supreme Court of this State held that Chapter 23728 of the acts of 1947 was not in violation of the provisions of the Fifth and the Fourteenth Amendments of the Constitution of the United States.

On the 7th day of April, 1948 Plaintiff filed its Bill of Complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, and briefly stated, it was shown that the Plaintiff was a Florida corporation;

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that it was the owner of a racing Permit granted by the State of Florida for the purpose of operating a horse race track in Broward County, Florida, where pari mutuel betting was permitted. It was shown at the time of the issuance of the original permit in 1937 that the Florida law required that where there were competitive tracks operating under similar permits that the Florida State Racing Commission should fix and award and allocate dates which should be apportioned to the several tracks in a fair and impartial manner. It was then shown that under the provisions of the Act of 1943, Chapter 22072, State of Florida, the power of the State Racing Commission was further expanded so that any tracks within One hundred air miles of each other should not operate on the same dates and the Racing Commission was given the power to fix the operation dates between the several tracks affected in the same fair and impartial manner. The Bill further charged that there were three tracks under permit and operating within a one hundred mile radius, to wit: Gables Racing Association, Inc. operating a track known as "Tropical Park," and Hialeah Race Course, Inc., operating "Hialeah Park." The Bill charged that notwithstanding the plain intent of the Statute that the Racing Commission had, in violation of its trust and its duties imposed by law, for the year 1947 allocated dates to Hialeah Race Course, Inc. in other than a fair and impartial manner and by gross discrimination granted to said Hialeah Race Course, Inc. the Forty (40) days for racing in the heart of the winter season in the Dade County, Florida area running from approximately January 17th until approximately March 2nd, 1947, which, excluding Sundays, amounted to Forty (40) days of racing. It is charged that during this period of time the normal tourist season was in full force and that the Forty (40) days prior to the 17th of January approximately, and the Forty (40)

days after March 3rd approximately, allocated to Gulfstream Park Racing Association, Inc., as far as the first date was concerned, and Gables Racing Association, Inc., as far as the last dates were concerned, were not a distribution of the dates on a fair and impartial manner. The Bill charged total discrimination by the acts of the State Racing Commission and it was shown that any track operating during the middle period could, with normal expectation, do practically double the amount of business that could be done either in the early or the late portion of the winter season. The Bill described the factual matters in support of the charge of extreme discrimination in full. It was then charged that before litigation could be instituted to test this allocation, that the legislature of the State of Florida passed Chapter 23728, which became a law on May 21, 1947, but by its own terms could not be effective for the 1947-48 racing season. Notwithstanding the charge of discrimination and the opposition filed by Gulfstream Park Racing Association, Inc. and Gables Racing Association, Inc. to the awarding of alleged choice middle dates to Hialeah Race Course, Inc. the Florida State Racing Commission did again in the summer of 1947 reallocate the same middle forty days of racing to Hialeah Race Course, Inc. The Bill of Complaint was filed on April 7th, 1948 prior to the time that it became the duty of the Florida State Racing Commission to allocate any dates for the 1948-49 session of racing which, under the law, is permitted for One hundred twenty (120) days beginning not earlier than December 1st in any one year, and extending for One hundred twenty (120) days of racing, exclusive of Sundays, until about April 20th of the following year. The Bill further showed that among other things the legislature of the State of Florida allocated to or vested the right of selection in the race track which had produced the largest state revenue for the previous year,

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giving to it the choice of selecting the dates it wished to operate the succeeding year. It was charged that this was a grant of a monopoly and an illegal discrimination as between Permit holders of the same class.

The Bill clearly charges that each of the Permit holders for race tracks in this area, coming within the one hundred mile radius, had all been granted their franchises, invested their money and built their plants at a time when the state law required the State Racing Commission to allocate the dates in a fair and impartial manner, and based upon that understanding large investments had been made by the Plaintiff below, Gulfstream Park Racing Association, Inc. that the right to share on a reasonable and/or an impartial basis in the rich midwinter dates was a valuable property right which the Plaintiff, Gulfstream Park Racing Association, Inc. had a right to enjoy at certain times upon a proper allocation. The bill charges sufficient facts with reference to two phases of the Act which are claimed to be unconstitutional.

1. The legislature separates one hundred twenty (120) days of racing, beginning with December 1st of each year, into three terms of Forty (40) days each. It will thus be seen that beginning with December 1st of each year one track is allocated Forty (40) days of racing. Excluding Sundays this usually causes the next Forty days to begin about January 17th. Forty days of continuous racing then, excluding Sundays, would make the middle forty days of racing expire about March 2nd, depending upon whether or not the year is Leap Year. The next Forty days of racing would begin on or about March 3rd and run until approximately April 19th. There would be a one day variation in Leap Year, as far as the second and third dates are concerned, and if December 1st happened to fall on a Sunday, there would be a day variation. The Act on its face does

not purport to allocate any of the Forty day terms to any particular track but it rests in the track which has shown the highest revenue for the previous year the right to select the forty-day period which it wants. Thus, on the basis of the bill one of three similar permit holders is granted an illegal preference and discrimination to select whatever dates it sees fit. This is not an allocation on a fair and impartial manner nor in accordance with law.

2. The next phase charged in the bill is that even though the Court might not hold that the method of selection is in itself unconstitutional, yet the effect of the act when applied to the particular facts of the case, results in an unfair discrimination and the denial of equal protection and the taking of a property right without due process.

As above pointed out the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, overruled the Motion to Dismiss the Bill of Complaint and thereby overruled the contention made by the Defendant that the Statute was constitutional. On appeal by writ of certiorari, which is the interlocutory appeal system used in Florida, the Supreme Court of Florida, did, on the 19th day of November, 1948, issue an Opinion, a copy of which is appended to this statement. Under the rules of the Supreme Court of Florida Fifteen (15) days is allowed from the date of the rendition of the first Opinion for the filing of a Petition for Rehearing. This Petition for Rehearing was filed within the statutory period, and on the 21st day of December, A. D., 1948, the Supreme Court of Florida entered an order denying the Petition for Rehearing without further Opinion, and on the 21st day of December, A. D., 1948, the official Order and Judgment of the Supreme Court of Florida was entered in the nature of a mandate, a copy of which is attached as an appendix hereto.

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b. Statutory Provisions as to Jurisdiction

This appeal is taken under the revised provisions of Section 344 of Title 28, United States Code Annotated, 1940 Edition, relating to procedure for review of the decision of the state courts, as now revised and carried as Title 28, Paragraph 1257, United States Code Annotated, which is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There are other provisions in this Section covering writ of certiorari. This appeal is taken under Paragraph 2 because the Supreme Court of Florida, which is the court of last resort of the State of Florida, upheld the constitutionality of Chapter 23728 of the Acts of 1947 against the contention that the statute was unconstitutional and violated both the State and Federal Constitutions, and particularly was in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

c. Statute of the State Involved

Chapter 23728 of the Acts of the Florida Legislature for the year 1947 is the primary statute in question. The title to said Act is as follows:

> "An Act to allocate and provide the period of operation of horse race tracks and to prohibit future permits

in this state where three horse race tracks are located, within a radius of one hundred air miles of each other and making findings and declaration of policy relative thereto."

The Act is discussed fully in the Supreme Court of Florida Opinion which is attached hereto as an appendix but we will point out certain features briefly.

1. Section 1 of the Act takes away from the Florida State Racing Commission the power to allocate dates on a fair and impartial manner, which had been the previous statutory method of allocation of dates.

2. Section 2 reestablishes a one hundred twenty (120) day racing season but divides the racing season beginning December 1st of each year into three periods of forty (40) consecutive days of racing, and

3. Section 3 provides that the track producing the most tax revenue in the preceding year should have its choice of periods, and the second would then have the second choice, and the one who had produced the least revenue would have to take what was left.

Prior to the enactment of the statute above mentioned of the State of Florida, by the Acts of 1935 known as Section 550.02 of the Florida Statutes, it was made the duty of the State Racing Commission of Florida to do as follows: "Fix and set the dates for racing in any county where there are one or more horse tracks or one or more dog tracks seeking to race and holding ratified permits upon which any track can operate in any county, apportioning such dates to the several tracks in such counties in a fair and impartial manner." This Act was amended by the Acts of the Legislature of Florida for 1943 known as Chapter 22072 which added to the original County provisions the following: "Provided,

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however, that no horse race tracks located within one hundred air miles shall operate on the same dates.''

Section 550.05 of the Florida Statutes, as last amended by the laws of 1935, Chapter 17276, provides for the method and manner of obtaining a permit to operate or conduct a race meeting with pari-mutuel betting and provides the qualifications.

Section 550.06 of the Florida Statutes requires an election to be held to ratify the permits granted by the Florida State Racing Commission.

The effect of the Florida Statutes above mentioned was to authorize the Racing Commission of the State of Florida to grant permits subject to an election by the voters of the particular county and to grant the final permits and then to allocate dates on a fair and impartial manner between competitive tracks within a one hundred mile radius of each other. That was the effect of the law until the adoption of Chapter 23728 of the Acts of 1947.

d. The Date of Judgment or Decree Sought to Be Reviewed and Date upon Which the Application for Appeal Is Presented.

The Final order and judgment of the decree sought to be reviewed was entered and placed of record by the mandate of the Supreme Court of Florida dated the 21st day of December, 1948. The Petition for Appeal herein was presented and filed on the 24th day of February A. D., 1949. A copy of the original Opinion dated November 19, 1948, and a copy of the mandate thereon are both attached as an appendix to this statement.

e. Statement Showing that the Nature of the Case and of the Rulings of the Court Were Such as to Bring the Case Within the Jurisdictional Provisions Relied Upon.

The Federal question was raised in the Bill of Complaint which specifically charged that the Legislature of the State of Florida, by passing Chapter 23728, had violated the Plaintiff's constitutional rights guaranteed to it under the Constitution of the State of Florida, and the Constitution of the United States of America, and specifically charged that it contravened the provisions and rights guaranteed to the Plaintiff under the Fifth Amendment as to the equal protection of the law and due process, and that the State, acting through its legislature in passing the said Act, had violated the Fourteenth Amendment of the United States Constitution. The Bill of Complaint charges that when the Plaintiff, Gulfstream Park Racing Association, Inc., applied to the State Racing Commission of the State of Florida for a Permit and had said Permit authorized, and when said Permit was then voted upon and ratified by the voters of Broward County, Florida, that the then Statutes of the State of Florida, covering the rules and regulations under which said Permit could be enjoyed, were an essential part of the property right which the parties had. It was charged in the Bill that when such Permits were obtained and expenses were incurred in the construction of said racing plant that the Florida law authorized and directed the State Racing Commission to allocate dates between competitive race tracks in a fair and impartial manner. It was pointed out under the Florida Supreme Court decision that the Supreme Court of the State of Florida had laid down certain definite rules under these same Statutes, particularly in the case of *State ex rel. Paoli* v. *Baldwin, et al.*, 31 So. 2d 627, — Fla. —, Opinion rendered May 6th, 1947, as follows:

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Head Note #1. The constitutional requirements of "due process of law" are not satisfied by a hearing if person whose life, liberty or property is at stake, is not permitted to interpose reasonable and legitimate defenses."

"Head Note #2. Possession of a license to pursue profession of race horse trainer was a valuable right of which licensee could not be deprived without due process of law."

It was pointed out in the Bill that prior to the adoption of said Chapter 23728 of the Acts of 1947, each of these three competitive race tracks within a radius of one hundred miles had valuable franchises and that one of the valuable features of that franchise was the right to have the racing dates allocated between the tracks in a fair and impartial manner. It was charged in the Bill of Complaint that the middle dates, that is, from approximately January 17th, of each year to about March 2nd, of each year, were the lucrative or choice dates because that was the height of the normal tourist season in this State, and particularly in the Southeastern Florida area, and that any horse track running in this area in those dates could produce a revenue, net to itself, of at least twice that which could be enjoyed if operating either in the first Forty (40) days, beginning with December 1st, or with the last Forty (40) days, ending in April. It was shown that the first dates ran into competition with northern tracks, with the Christmas buying season, with football, and the fact that the tourist season did not generally start in the South Florida area until later on in the winter season. It was charged and shown that the last Forty (40) days of racing were in direct competition, particularly the last of March and April, with many of the Eastern tracks of the United States. It was charged in the Bill of Complaint that for several years prior to the adoption of Chapter 23728 of the Acts of 1947 the Florida State

Racing Commission had, in an arbitrary and discriminatory manner, and over the violent protest of Gulfstream Park Racing Association, Inc., and Gables Racing Association, Inc., awarded to Hialeah Race Course, Inc. the choice middle dates without attempting to allocate them on a fair and impartial manner or to set up any system of rotation. Litigation was threatened to test the power of the Racing Commission to discriminate and to have the courts of the State of Florida, by appropriate action, force the Racing Commission to perform its duty but before said action could be instituted the Legislature of the State of Florida, by the adoption of said Chapter 23728 of the 1947 legislature, took the power of allocation away from the State Racing Commission and by legislative mandate authorized the Hialeah Race Course, Inc., which had enjoyed the previous lucrative dates, in effect to make its own selection and to perpetuate itself in the use and enjoyment of the lucrative middle dates. It is shown in the Bill of Complaint that any of the three race tracks which were permitted to operate in the middle Forty days in the height of the winter season regardless of capacity of the track, could operate and produce a higher revenue for the State of Florida than any of the other two tracks operating on the first or last dates. The Bill specifically charged that the plant and equipment and the location of Gulfstream Park Racing Association, Inc., was far superior to that of Hialeah Park, and it was charged that its seating capacity was equal to that of the other two tracks combined, and that if it were permitted to operate in the lucrative middle dates that it could produce to the State of Florida a tax return in excess of that of Hialeah Park Racing Association, Inc. These charges are made in the Bill of Complaint. The Supreme Court of the State of Florida, in speaking of the 1935 Act, in the case of *State ex rel. West Flagler Amusement Co., Inc.* v. *Rose,* 165 So. 60, 122 Fla. 227, held:

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"Undoubtedly a racing permit or license granted under the statute confers no franchise but is a mere license granted, or withheld, at the option of the state acting under its police powers. Prettyman *v.* Florida Real Estate Commission, 92 Fla. 515, 109 So. 442. However, the right to profitably enjoy the benefits of a license after it is already granted without undue prejudice to the licensee, or undue discrimination in favor of other licensees similarly situated, is likewise implied, if not expressed, in the requirement of the statute that where there are more than one dog track operating in the same county, the "dates" to the several tracks in such counties shall be apportioned in a fair and impartial manner."

The Court further said:

"We hold further that the duty of the state racing commission to apportion dates to the several dog tracks in Dade County in a fair and impartial manner is a duty to so "fix and set the dates for racing" that the track season, which is the period comprehended in the total number of days allowed to each track, will afford to each licensee a substantially equal opportunity for the beneficial enjoyment of its permit and the realization of its permit opportunities."

The Florida State Racing Commission and Hialeah Race Course, Inc., both filed Motions to Dismiss the Bill of Complaint and Ground #13 of the Motion filed by Hialeah Race Course, Inc., is as follows:

"It is apparent that the act in question is within the police power of the State of Florida."

Ground #14 is as follows:

"That it is apparent from the Bill of Complaint that plaintiff is operating under a license issued by the State of Florida that is a matter of grace and not a matter of right, and that the State has full power and

authority to permit operations under such license on such terms and conditions as it may by law provide."

Ground #21 is as follows:

"And it is apparent from the Bill of Complaint that plaintiff accepted a permit to engage in business which was unlawful except for an act of the Legislature; therefore, he went into said business with full knowledge of the fact that the Legislature could impose any restrictions or regulations thereupon or could absolutely prohibit further operations of said business for which a permit was issued."

The Florida State Racing Commission, in its Motion to Dismiss, Ground #5, raises the following question:

"The regulatory provisions contained in the legislative act complained of are in no wise discriminatory but rather appear to be based upon a most just and practical basis of classification."

Ground #6 is as follows:

"The legislative act complained of sets up a substantial and reasonable basis of classification in full accord with all constitutional mandates."

The Circuit Judge denied the two Motions to Dismiss and ordered answers to be filed by his order of the 20th day of July, 1948, and the said Hialeah Race Course, Inc., then took an interlocutory appeal from said Order by Petition for Writ of Certiorari. The Opinion of the Supreme Court of the State of Florida, which is referred to and attached as an Appendix, relied simply upon the doctrine of monopolies as set forth in Section 41 of Vol. 36, Amer. Juris., at page 522, and no State or Federal decisions were quoted, and the Supreme Court of Florida, by a Four to Three decision of the Justices, said:

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"The state has become pecuniarily interested in racing because of the revenue from the pari-mutuel betting. Authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises over which the exercise of the police power is not so essential for the public welfare.

We are of the conclusion that Ch. 23728 (Acts 1945) is not unconstitutional per se, and that plaintiff's bill fails to present such facts as result in a violation of its constitutional rights when the provisions of the act are complied with and abided by."

A Petition for Rehearing was filed pointing out specifically that no one questioned the right of the State, under its police power, to abolish horse racing connected with pari-mutuel betting but that the Supreme Court of Florida had completely overlooked the theory upon which the lower court had held the act in effect unconstitutional, and that was that even though the police power of the State may permit the state to abolish all gambling or pari-mutuel betting, yet when permits were granted either to race track operators, liquor license holders or other type of special licensees under the same rules and regulations, that the State could not then discriminate between equal permit and license holders so as to favor one to the detriment of the other. The Supreme Court of Florida refused to rehear the matter and thus this appeal has been taken to the Supreme Court of the United States.

f. Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial

Two questions are presented to this Court on this appeal. First: May the Legislature of the State of Florida, by an

Act of the Legislature, delegate to anyone other than a legislative or administrative Board, its power under the police power of the State, and at its discretion to select, dates in which a permit holder shall be permitted to operate as against its competitors, thus giving not to a State Commission but to a competitive Permit holder, the uncontrolled discrimination to select the dates within which it shall operate and determine in their own minds, which of three dates or periods, which are admittedly not equal, should be selected by said permit holder for its operation?

Second: Whether the legislature of a state under the guise of its police power may discriminate, or permit discrimination, as between permit holders of the same class, all licensed equally, so that one may enjoy its franchise to a far greater extent and advantage than the other permit holders may enjoy their franchise? As a part of this question, to show the substantial questions involved, this appeal involves the question as to whether the legislature, acting as a legislative body of the State, may, by and through its own act, or through the action of its administrative officials, violate the constitutional rights of the Plaintiff below, which are provided by the "equal protection of laws" clause of the Fourteenth Amendment, and may, when so aggrieved, show that as a matter of fact their rights are so violated by discriminatory action on the part of the state against it. As a subhead under this phase, the question is proposed that even though the Federal Government may not have the right to regulate, relating to certain business and occupations which, because of their nature, may prove offensive to the public, yet does the Federal government, through its constitutional provisions, have the right to prevent regulation by the state from being arbitrary or discriminatory, even though the business regulated is not a strict franchise but merely a privilege granted or withheld by the State at

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its pleasure. As a corollary to this rule there is a question raised as to whether or not an Act which is valid on its face but which, as a matter of fact, results in discriminatory application to those who are entitled to be treated alike, may be declared to be a denial of the equal protection of the law as provided by the Federal Constitution.

The issues involved in this cause of action as raised by the Bill of Complaint are so substantial that the one Chancellor in the court below in effect held the Act to be discriminatory and unconstitutional in its application to the Plaintiff's position. On appeal three Justices of the Supreme Court concurred in that view and four Justices reversed the decision of the lower court, but on a principle of law which we have heretofore pointed out which had no application to the real issue in the case. Thus four Judges who have heard this case have felt that the Act was discriminatory as applied to the Plaintiff and four Judges held that the state had an unlimited right to do what it wanted to, even though there was a discrimination between permit holders of the same class. If the facts alleged in the Bill of Complaint are admitted to be true for the purpose of the Motion then certainly a very substantial question, both as to the law and the discriminatory feature, is submitted.

It is thus contended that the decision in this case affects not only valuable property rights of the Plaintiff but that it denies to one similarly situated under the laws of the State of Florida the right to profitably enjoy the benefits of its license and it is charged, as shown in Paragraph 10 of the Bill of Complaint, that the effect of the allocation of the Forty middle choice dates to one of the permit holders, to wit: Hialeah Race Course, Inc., results in said race course having just twice as many profitable days for racing as that granted to either of the other tracks. It is further

contended that if this principle of law remains unchallenged that the legislature of the State of Florida would have the same rights covering a multitude of other types of ventures such as the operation of filling stations, barber shops, meat packing plants, rendering plants, and practically every other class of business which has accordingly come under the protection and control of the police power of the state because either it is a noxious industry or because it does affect the public enterprise or the public welfare. It is contended that this point is highly debatable and should be resolved in favor of the Plaintiff's contention if orderly government is to continue in the State of Florida. It is conceded that a state may restrict the sale of whiskey but if this rule of law is permitted to stand the state may permit the sale of whiskey by a favored one in one location, granting to that permit holder all of the choice hours and relegate other permit holders who are not so favored, but who are qualified under the same law, to an operation at odd hours, or from midnight to six o'clock in the morning or such unreasonable times as that. It is therefore submitted that the effect of this decision goes far beyond the interest of the particular litigants in this cause and raises a direct and a sharp conflict between the protection guaranteed by the Constitution of the United States of America in comparison to the expansion of the alleged state police power as upheld by the Supreme Court of Florida in this particular case. The decision of the Supreme Court of Florida violates the principles laid down by the Circuit Court of Appeals, for the Sixth Circuit in the case of *Glicker* v. *Michigan Liquor Control Commission*, 160 F. 2d 96, and it is squarely in conflict with the decision of the Supreme Court of the United States in *Cotting* v. *Godard, as Attorney General of the State of Kansas*, 183 U. S. 79, 182 S. Ct. 30, 46 L. Ed. page 92 in which it was held a stock-yards company was denied the

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equal protection of the laws by Kan. act March 3, 1897, which limits the amount of the charges to be made by that corporation, without limiting the charges to be made by other similar corporations doing a smaller amount of business, and without any reference to the character or value of the services rendered, although the statute is general in its terms and is made applicable to any corporation doing business of a certain amount, and notwithstanding the fact that by virtue of the great amount of business done by the corporation affected by the statute it may make a reasonable income, since the statute makes a positive and direct discrimination between persons engaged in the same class of business, and bases it simply upon the quantity of business which each may do.

In this case this court held that a classification of rate making power on a stock yard, contrasting the amount of business which it did with other stock yards similarly chartered and similarly operating under the state laws of Kansas, was an arbitrary and discriminatory classification and violated the Fourteenth Amendment.

g. Facts

The facts are admitted for the purpose of testing the Motions to Dismiss and therefore it must be assumed that from a factual viewpoint there is a substantial discrimination and that the charge made in the Bill of Complaint that there are only about Twenty days out of the first Forty days where racing can be conducted profitably in Florida, and only about Twenty days out of the last Forty days where racing can be conducted profitably, are admitted for the sake of this appeal, and that one enjoying the middle Forty days can conduct racing profitably in each of the Forty days.

h. Provisions and Authorities

We have heretofore mentioned the case of *Cotting* v. *Godard,* 183 U. S. 79, 182 S. Ct. 30, 46 L. Ed. 92, and the principles applicable discussed by the Circuit Court of Appeals for the Sixth Circuit, 160 F. 2d 96. This case, among other principles of law laid down, contained the following statement:

> "The federal government does not have right to regulate matters relating to certain business and occupations which because of their nature may prove injurious or offensive to the public, which are exclusively under control of state, through exercise of its police power, but it does have the right by virtue of Fourteenth Amendment, to prevent regulation by state from being arbitrary or discriminatory, and the rule is equally as applicable where the business being regulated is not a franchise or property right but is merely a privilege granted or withheld by state at its pleasure."

Head Note # 8 provides:

> "The Constitutional rights provided by the "equal protection of laws" clause of Fourteenth Amendment to a person within state, are violated by intentional discriminatory action against him on part of state, acting either through its legislative body or by administrative action of its officials and remedial action is provided therefor by statute."

In the body of this Opinion the Sixth Circuit Court of Appeals relies upon the decision of the Supreme Court of the United States in *Snowden* v. *Hughes,* 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497. These same rights apply to a corporation as to individuals. See *Power Manufacturing Co.* v. *Saunders,* 47 S. Ct. 678, 274 U. S. 490. See *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison,* 301 U. S. 459, 57 S. Ct. 838. *Sunday Lake Iron Company* v.

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Township of Wakefield, 247 U. S. 350, 38 S. Ct. 495. *Adams* v. *Tanner*, 244 U. S. 590, 37 S. Ct. 662. *Truax* v. *Corrigan*, 257 U. S. 312, 42 S. Ct. 124.

i. Statement Respecting Opinion of Supreme Court

The Opinion of the Supreme Court of Florida is attached as Appendix "A" and the Mandate is attached as Appendix "B" to this jurisdictional statement. The Opinion of the Supreme Court of Florida does not dispose of any of the questions which are actually proposed by this appeal. In spite of the many Federal decisions on this point, the Supreme Court of Florida ignored all of the citations, including their own decision in the case of State ex rel. *Paoli* v. *Baldwin*, 31 So. 2d 627, Fla. , which in effect held that even though a race track trainer, holding a permit to operate and engage in racing in Florida under the same acts involved herein, held a special privilege, yet that the license was a valuable right of which he could not be deprived without due process. The first Opinion in that case, which was by a four to three opinion held that the regulation when considered with reference to the subject matter, horse races and wagering, was a valid regulation. On rehearing and by a four to three Opinion the Supreme Court of Florida changed its opinion and held that the state did not have the power to pass an arbitrary statute or rule even though horse racing and wagering thereon was involved. The only citation of authority referred to by the Supreme Court of Florida in the Opinion in the present case, is a general discussion of monopolies contained in Sec. 41, Vol. 36 Amer. Juris. at page 522, which we contend has no application to the issue at hand. In the Petition for Rehearing the authorities referred to in the note at page 522 of 36 Amer. Juris. were analyzed showing that the authors of that work were discussing a general

type of monopoly on an issue foreign to that involved in that case, and that none of the authorities quoted by the authors of that work dealt with the discrimination by the state, either by a rule or act of the legislature as between permit holders or licensees of the same class.

It is, therefore, respectfully submitted, that this court has jurisdiction of this appeal under Section 1257 United States Code Annotated, Title 28, which is Section 237, as amended, of the Judicial Code.

W. G. WARD,
CHARLES A. MOREHEAD,
Counsel for Appellants.

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APPENDIX "A"

IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1948, EN BANC

HIALEAH RACE COURSE, INC., a Corporation, *Petitioner,*

vs.

GULFSTREAM PARK RACING ASSOCIATION, INC., a Florida Corporation, *Respondent*

Opinion Filed November 19, 1948

A Writ of Certiorari to the Circuit Court for Dade County, Charles A. Carroll, Judge

Nichols & Gaither, Ausley, Collins & Truett, for Hialeah Race Course, Inc., and Morehead, Pallot, Smith, Green & Phillips and John B. Orr, for Gables Racing Association, Inc., Petitioners.

Ward & Ward and Berryhill & Laird for Gulfstream Park Racing Association, Inc., and William B. Watson, Jr., for Florida State Racing Association, Respondents.

CHAPMAN, *J.:*

The respondent, Gulfstream Park Racing Association, as plaintiff, by its bill alleges that it is the holder of a "permit" to conduct race meetings and the defendants, Hialeah Race Course, Inc., and the Gables Racing Association, Inc., also hold permits for such purposes, and they will hereinafter be referred to as "Hialeah" and "Tropical Park," respectively;

That the defendant, Florida State Racing Commission, hereinafter referred to as the "Commission," was created by the Legislature in 1935, and its duties and powers are covered by Section 550.02, F. S. 1941, F. S. A. This statute provides for a 120-day racing season, beginning December 1 each year, which the Commission shall apportion to the various tracks in a fair and impartial manner. This statute also provides that no horse race tracks located within one

hundred air miles of each other shall operate on the same date. The three tracks which are parties in this action fall within this restrictive provision.

Plaintiff further alleges that the peak of the tourist season in southeast Florida now and for many years has been from about January 20 to March 15; that consequently this period is the most profitable for operating horse races and pari-mutuel betting; that, since plaintiff's creation, Hialeah has been allotted a forty-day period running approximately from January 20 to March 3, the choice dates for a profitable operation; that, although plaintiff has asked for these dates each year, the Commission arbitrarily and contrary to the mandatory provisions of the statute requiring a fair and impartial allocation, assigned these dates to Hialeah; and

That the 1947 Legislature of Florida adopted Chapter 23728 of the Acts of 1947, the title to said act being as follows:

> "An Act to Allocate and Provide the Period of Operation of Horse Race Tracks Which Are Located Within a Radius of One Hundred Air Miles of Each Other and Making Findings and Declaration of Policy Relative Thereto."

Section 1 of this act takes from the Commission the power to allocate dates; Section 2 establishes a 120-day racing season, to be divided into consecutive 40-day periods beginning December 1 each year; Section 3 provides that the track producing the most tax revenue in the preceding year shall have its choice of periods, and the second in production shall have second choice.

Plaintiff by its bill further charges that Section 3 of this act is unconstitutional, alleging numerous grounds, viz: misleading title, denial of due process and equal protection, and deprivation of a property right, and prays that the Court will hold Section 3 of said Chapter 23728 unconstitutional and will direct the Commission to allocate the racing dates in a fair and impartial manner, or that the Court set up a fair plan of rotation.

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To the foregoing bill of complaint the petitioner filed a motion to dismiss which the chancellor denied, of which order petitioner now seeks a review by certiorari.

The Legislature, by Section 1 of Chapter 23728 made certain findings, to the effect that the allocation of the time of operation was affected with a public interest, as follows:

> "Section 1. It is the finding of the Legislature of the State of Florida that the operation of horse racing and legalized pari-mutuel and mutuel betting at horse race tracks in this State is a substantial business compatible to the best interests of the State and the taxes derived therefrom constitute an integral part of the tax structures of the State and counties. It is the further finding of the Legislature that two or more horse race tracks located within a radius of one hundred air miles of each other cannot operate on the same racing days without endangering the tax revenue derived therefrom and the general welfare of the public. It is the further finding of the Legislature that where more than one horse race track is located in a radius of one hundred air miles of one or more horse race tracks and the allocation and distribution of periods of operation to and between said horse race tracks is vested solely in the discretion of the State Racing Commission, that the power to change, alter and vary such racing periods from year to year, as it may see fit, is unsound and unwise, and creates a condition of uncertainty which retards the natural expansion and development of this business and influences and affects the financial stability of the State and Counties. It is therefore declared to be the policy of the State of Florida that the present danger to the growth and welfare of horse racing and to the tax structure of the State and Counties be eliminated insofar as the discretionary powers of the State Racing Commission in allocating dates to the horse tracks is concerned and this enactment is made pursuant to and for the purpose of carrying out such policy."

The law generally stated relative to *monopolies* is as follows:

"Sec. 41. *Basis and Extent of Legislative Power; Public Interest as Justification.*—As previously indicated, the police power is ordinarily the basis and criterion of the legislative right to create monopolies by the grant of special or exclusive privileges, although in the case of public utilities the right is sometimes predicated on the power of eminent domain. Hence, a state legislature cannot, under the guise of the police power, create a monopoly in any trade, occupation, or article innocuous in itself and the prosecution of or dealing in which is within the common right of all citizens upon equal terms. But unless the Constitution prohibits all monopolies by name, it seems established that even in states whose Constitutions contain general provisions, such as are above indicated, exclusive privileges and franchises may be granted in the public interest, or when necessary to the public safety or welfare. If a clear and manifest legislative right cannot be exercised without conferring privileges in the nature of a monopoly, then, as the authorities all agree, a monopoly may be created, for a denial of the right will not be suffered. However partial it may seem, the state can create a monopoly of any business that is inherently dangerous to society and for that reason may lawfully be prohibited by it on the grounds of public policy, without violating any constitutional inhibition, because no person possesses an inherent right to engage in any employment the pursuit of which is necessarily detrimental to the public.

"In general, if the necessity and reasonable adaptation of the monopoly to the accomplishment of a legitimate purpose furnished the true criterion, it would seem that before applying these general constitutional provisions to a statute creating a monopoly, it is necessary to determine, independently of them, whether or

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not the monopoly is necessary and reasonably adapted to the accomplishment of a legitimate police or public purpose."

36 Am. Jur. p. 522—Sec. 41—Monopolies, Combinations, etc.

The power of the legislature to limit racing to 120 days and to prescribe that no two tracks shall operate at the same time is not questioned. Since the limitation of time is imposed it then becomes a question of the validity of the act in respect to its provision for the allocation of time among the three tracks.

The state has become pecuniarily interested in racing because of the revenue from the pari-mutuel betting. Authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises over which the exercise of the police power is not so essential for the public welfare.

We are of the conclusion that ch. 23728 (Acts 1945) is not unconstitutional per se, and that plaintiff's bill fails to present such facts as result in a violation of its constitutional rights when the provisions of the act are complied with and abided by.

Certiorari is granted and the order is quashed.

Barns, Adams and Hobson, *J. J.* Concur.
Thomas, *C. J.*, Terrell and Sebring, *J. J.* Dissent.

APPENDIX "B"

Filed this 23 day of Dec. A.D. 1948, recorded this 24 day of Dec. A.D. 1948, in Chancery Order Book 889 on Page 71. E. B. Leatherman, Clerk Circuit Court. By S. E. Doughty, D. C.

MANDATE FROM SUPREME COURT

THE STATE OF FLORIDA

To the Honorable, the Judge of the Circuit Court for the Eleventh Judicial Circuit, of Florida, Greeting:

WHEREAS, Lately in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for the County of Dade in a cause wherein #116214, Gulfstream Park Racing Association, a Florida corporation, was plaintiff and Charles F. Baldwin, William B. Watson, J. D. Johnson, Tom B. Swan and Emil Yde, as and constituting the Florida State Racing Commission; Hialeah Race Course, Inc., a corporation organized and existing under the laws of the State of Florida, having its principal place of business in Dade County, Florida, and Gables Racing Association, Inc., a Florida corporation, were defendants, the Order of said Circuit Court was rendered July 20, 1948, as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

AND WHEREAS, at the June Term of said Supreme Court holden at Tallahassee, A.D., 1948, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 19th day of November, A.D., 1948 it was considered by said Supreme Court that the Certiorari is granted and the order of the Circuit Court is quashed; it is further ordered by the Court that the Petitioner do have and recover of and from the Respondent its costs by it in this behalf expended, which costs are taxed at the sum of — Dollars; therefore,

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You are hereby commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Order of the Circuit Court notwithstanding.

Witness, The Honorable Elwyn Thomas, Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 21st day of December, 1948.

GUYTE P. MCCORD,
Clerk, Supreme Court of Florida.